

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 UNITED STATES,

No. C 07-02564 CRB

12 Plaintiff,

**ORDER DENYING MOTION TO LIFT
STAY**

13 v.

14 DICK/MORGANTI, ET AL.,

15 Defendants.

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17 Plaintiff Webcor moves the Court for an order lifting the stay imposed on October 19,
18 2007, which precludes Webcor from proceeding on its claims in this Court to allow for the
19 possible resolution of Webcor's claims through the administrative procedure set forth in the
20 Contract Disputes Act, 41 U.S.C. § 605.

21 Plaintiff is understandably frustrated by the failure of the General Services
22 Administration's Contracting Officer to issue a decision within the 60 days mandated by the
23 CDA on Webcor's change order requests for costs incurred in building the San Francisco
24 Federal Building. The GSA contracting officer is obligated by law to either render a decision
25 within sixty days of receipt of a certified claim over \$100,000 or provide notification of the
26 date upon which a decision will be issued. See 41 U.S.C. § 605(c)(2). All parties agree that
27 despite an assurance from the contracting officer that a decision would be issued by April 11,
28 2008 – almost ten months after submission of Webcor's claim – the contracting officer has

1 failed to do so. The Court is sympathetic to Webcor's desire for a prompt resolution of its
2 claims; as Congress recognized in enacting the Miller Act, the risk of nonpayment for goods
3 and services provided for a government project should not be borne by the laborers or
4 materialmen.

5 That said, the Court has already concluded that Webcor and Defendant Dick/Morganti
6 (D/M) are sophisticated parties that entered into a valid contract, which obligated Webcor to
7 stay any action against D/M until the resolution of the CDA process. Although lifting the
8 stay would be appropriate upon a showing that D/M has materially breached the contract by
9 failing to uphold its portion of the bargain, Filet Menu, Inc. v. C.C.L. & G., Inc., 79 Cal.
10 App. 4th 852, 861 (Cal. Ct. App. 2000), the Court does not believe that such a finding would
11 be appropriate at this time.¹ D/M has hired new, experienced counsel to ensure speedy
12 resolution of the CDA process, and represents that Webcor's claims have now been properly
13 appealed to the Civilian Board of Contract Appeals on the theory of a "deemed denial."
14 See 41 U.S.C. § 605(c)(5) ("Any failure by the contracting officer to issue a decision on a
15 contract claim within the period required will be deemed to be a decision by the contracting
16 officer denying the claim and will authorize the commencement of the appeal or suit on the
17 claim as otherwise provided in this chapter."); Wether Decl. Exh. C. In light of that
18 representation, the Court concludes that D/M is diligently shepherding Webcor's claims
19 through the CDA process such that a stay remains appropriate.

20 The Court is not deaf to Webcor's frustration with D/M's seeming refusal to take
21 affirmative action without substantial prodding. The Court encourages D/M to take seriously
22 its obligation to diligently represent its subcontractors before the contracting officer and
23 board of contract appeals; the Court may grow wary of D/M's purported ardor for and

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25 ¹ Plaintiff argues that the Court also has discretion to lift the stay pursuant to 41 U.S.C. §
26 605(c)(5), which provides that "in the event an appeal . . . is . . . commenced in the absence of a prior
27 decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to
28 obtain a decision on the claim by the contracting officer." (Emphasis added). However, the CDA
authorizes appeals only to two "expert tribunals": an agency board of contract appeals or the Court of
Federal Claims. United States v. Suntip Co., 82 F.3d 1468, 1474 (9th Cir. 1996) (citing 41 U.S.C. §§
606, 609(a)(1)). Read in context, § 605(c)(5) thus authorizes the appropriate federal board of contract
appeals or the Court of Federal Claims – but not this Court – to stay (or not stay) an appeal from a
contracting officer's deemed denial.

1 commitment to the CDA process if D/M acts only in response to its subcontractors
2 complaints.

3 The motion to lift the stay is DENIED; the hearing scheduled for August 29, 2008 is
4 VACATED.

5 **IT IS SO ORDERED.**

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8 Dated: August 19, 2008
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CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE